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No. 90-1768

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

LEWIS STEPHEN WORK, ET AL., PETITIONERS

v.

TYSON FOODS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

JOHN A. BRYSON
WILLIAM B. LAZARUS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the resolution of an enforcement action brought by the government under Section 309(b) and (d) of the Clean Water Act, 33 U.S.C. 1319(b) and (d), precludes citizens from prosecuting the same violations against the same polluter in a separate citizen suit that had been initiated under Section 505(a)(1) of the Act, 33 U.S.C. 1365(a)(1), prior to commencement of the government's action.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-40) is reported at 921 F.2d 1394. The memorandum opinion of the district court (Pet. App. 44-60) is reported at 720 F. Supp. 132.

JURISDICTION

The judgment of the court of appeals (Pet. App. 41) was entered on December 18, 1990. The order of the court of appeals denying rehearing was entered on February 14, 1991. Pet. App. 81. The petition for a writ of certiorari was filed on May 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Water Act creates a comprehensive program "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). As part of that program, Section 301(a) of the Act prohibits all discharges of pollutants into navigable waters except those made in compliance with other sections of the Act, including Section 402, 33 U.S.C. 1342, which establishes the National Pollutant Discharge Elimination System (NPDES). See 33 U.S.C. 1311(a).

Section 402(a) provides that the Environmental Protection Agency (EPA) shall issue NPDES permits authorizing effluent discharges in strict compliance with conditions specified in the permit. 33 U.S.C. 1342(a). Section 309 of the Act authorizes the United States to enforce the terms of a permit through a variety of administrative, civil, and criminal mechanisms. See 33 U.S.C. 1319. In addition, Section 505(a)(1) of the Act permits private citizens to commence a civil action in certain situations against anyone "who is alleged to be in violation of * * * an effluent standard or limitation under this chapter," 33 U.S.C. 1365(a)(1), including the terms of a permit, 33 U.S.C. 1365(f). Section 505 authorizes the district courts to enforce the permit requirements and impose civil penalties, which are payable solely to the United States treasury. A citizen suit may also be brought against the Administrator alleging failure to perform a nondiscretionary duty under the Act. 33 U.S.C. 1365(a)(2).

The commencement of a citizen suit under Section 505 is, however, subject to certain limitations. Citizen suits against alleged violators may not be commenced either (1) prior to 60 days after giving

notice of an alleged violation to the Administrator of EPA, the State, and any alleged violator, 33 U.S.C. 1365(b)(1)(A)[1]; or (2) "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action * * * to require compliance * * *," 33 U.S.C. 1365(b)(1)(B). When a citizen suit is barred because the United States has commenced and is diligently prosecuting an enforcement action, Section 505(b)(1)(B) further provides that "any citizen may intervene as a matter of right" in any such action in a federal court. 33 U.S.C. 1365(b)(1)(B).

2. In March 1987, after giving the requisite notice, petitioners Lewis Stephen Work and others filed a complaint pursuant to the Clean Water Act's citizen suit provision against Tyson Food, Inc. (Tyson), the City of Green Forest, Arkansas, and the Administrator of EPA, among others, concerning pollution allegedly caused by discharges from the City of Green Forest's wastewater treatment plant. The United States subsequently brought a Clean Water Act enforcement action in September 1987 under Sections 309(b) and (d). The government's suit, like the citizen suit, sought civil penalties and injunctive relief against the City of Green Forest for its discharge of pollutants in violation of (1) Section 301 of the Act, 33 U.S.C. 1311, (2) certain terms and conditions of an NPDES permit issued to the City pursuant to Section 402 of the Act, 33 U.S.C. 1342, and (3) various Administrative Orders issued to the City under Section 309 of the Act, 33 U.S.C. 1319. The government's complaint alleged that the City had dis-

[1] Similarly, no citizen suit may be commenced against the Administrator prior to 60 days after giving notice of such action to the Administrator. 33 U.S.C. 1365(b)(2).

charged pollutants from the City's wastewater treatment works in excess of the limits established by the NPDES permit, and sought an order requiring the City to comply with the Act, the NPDES permit, and the Administrative Orders by adhering to the permit's effluent limitations and submitting required reports.

Nearly two months after the government filed its enforcement action, the citizens filed two motions in the government's action, one seeking intervention in the government's action and the other seeking consolidation of the two cases. The district court rejected the motion to intervene as untimely, and rejected the motion to consolidate on account of the complications that consolidation would cause.[2] The citizens did not file a notice of appeal from the court's denial of the intervention motion within the 60-day period allowed by Fed. R. App. P. 4(a).

The United States and the City subsequently engaged in extensive settlement negotiations in the government's enforcement action, resulting in a proposed consent decree and an opportunity for public comment. In March 1989, the citizens filed a second motion to intervene, based on the lodging of the proposed consent decree. The district court denied the citizens' second intervention motion, explaining that intervention was not appropriate and that the prospective intervenors had an opportunity to, and did, file their objections to the proposed consent decree during the available public comment period. See 28 C.F.R. 50.7. The consent decree was entered by the district court shortly after it denied the citizens' second motion to

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[2] The district court also denied another motion, filed by the citizens in their citizen suit, to consolidate the citizen suit with the government's enforcement action.

intervene. Pet. App. 78. The decree (1) required the City to pay a penalty of $15,000 for past violations and to maintain compliance with the NPDES permit and the Act, effective immediately, and (2) provided for stipulated penalties in the event of future violations.

Following the entry of the consent decree in the government's enforcement action, the district court dismissed the citizens' Clean Water Act claims against the City. The court explained that "[b]ecause issues raised against the City under the Clean Water Act have been resolved, plaintiffs are barred from raising the same issues here." Pet. App. 79. The citizens subsequently appealed from the district court's denials of their two intervention motions. That appeal was held in abeyance pending completion of the citizen suit at the citizens' request.

After a trial, a jury found in favor of the citizens as against Tyson Foods, and awarded $244,412 in damages on state law claims. The jury found in favor of the City on the citizens' claims against it that had not been dismissed. The district court entered judgment on the verdict and assessed Tyson $43,000 in civil penalties for the company's Clean Water Act violations. Tyson and the citizens both appealed, and their appeals were consolidated with the citizens' appeals from the denial of their intervention motion at the citizens' request.

3. The court of appeals affirmed the district court's dismissal of the citizens' Clean Water Act claims against the City. Pet. App. 16-21.[3] The court noted

[3] The court also determined that it lacked jurisdiction to consider the citizens' appeal from the denial of their first motion to intervene in the government's enforcement action because that appeal was untimely. Pet. App. 11-12. The court

that the citizens "concede[] that the CWA claims made in the citizens' suit were the same as those made by the EPA." *Id.* at 17. It stated that "there may be some cases in which it would be appropriate to let a citizens' action go forward in the wake of a subsequently-filed government enforcement action," *id.* at 19-20, but found that "this is not such a case" due to the entry of the consent decree, *id.* at 20:

> In view of the preeminent role that must be afforded the EPA in enforcing CWA act violations—a role contemplated by the legislative history and recognized by the Supreme Court in *Gwaltney* [*of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987)]—we hold that it was proper for the district court to dismiss [petitioners'] CWA claims against Green Forest after the latter had entered into a consent decree with the EPA. The EPA is charged with enforcing the CWA on behalf of all citizens. Since citizens suing under the CWA are cast in the role of private attorneys general, as a practical matter there was little left to be done after the EPA stepped in and negotiated a consent decree.

Ibid.

4. Following the denial by the court of appeals of requests for reconsideration, Pet. App. 81, the parties filed cross petitions for writs of certiorari. Because the issues identified in the two petitions all arose in the citizen suit, the United States waived its right to respond to those petitions. The Court subsequently

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determined that the district court had erred by denying the citizens' second motion to intervene, *id.* at 13, but determined that this error was "largely harmless," *id.* at 14; it remanded for the purpose of allowing the citizens an opportunity to recover attorneys' fees, *id.* at 15.

requested that the United States respond to question 1 in the citizens' petition, which concerns the propriety of the court of appeals' affirmance of the district court's dismissal of the citizens' Clean Water Act claims against the City.[4]

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners contend that the court of appeals "erroneously concluded that the entry of a consent decree in an enforcement action commenced subsequent to the filing of a citizens' suit pursuant to Section 505(a) of the CWA * * * precluded the prosecution of a previously filed citizen suit." Pet. 12. But there is no good reason why petitioners should have been permitted to pursue the very same claims resolved by the consent decree simply because the government's enforcement action was commenced subsequent to the filing of their suit. Indeed, as petitioners admit, "Congress intended for the EPA to have the primary role in enforcing the Act." Pet. 13, citing *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987); see also *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 310 (1989) (EPA's enforcement efforts may obviate the need for citizen suits). In *Gwaltney*, the Court held that "the

[4] Petitioners also complain that "the appellate court erred in holding the district court's failure to allow intervention harmless." Pet. 17 n.4. However, they add that "this error is overshadowed by the greater error herein addressed," *ibid.*, and they did not include any challenge to the court of appeals' rulings on intervention in their list of questions presented to the Court.

citizen suit is meant to supplement rather than to supplant governmental action." 484 U.S. at 60. Accordingly, where EPA has entered into a consent decree, citizens should not be permitted to pursue an action based on the claims resolved by the consent decree.

Contrary to petitioners' suggestions, Pet. 12-15, nothing in the Act supports their position. Neither the requirements of Section 505(b), which governs commencement of a citizen suit, nor the provisions of Section 505(c), which authorizes EPA to intervene in citizen suits and to review and comment on proposed consent decrees in citizens suits, show that Congress intended EPA's role as enforcer to diminish based simply upon the timing of commencement of an enforcement action by the government. Indeed, far from showing a congressional intent that EPA yields its role as primary enforcer of the Act if it waits to commence an enforcement action until after the filing of a citizen suit, the provisions petitioners cite reveal Congress's intent that EPA play a central role in enforcement actions even where the agency chooses not to file its own enforcement action.

Contrary to petitioners' assertion (Pet. 12), no other court of appeals has ruled differently than the court of appeals below. Petitioners wrongly cite the decision of the Fourth Circuit in *Chesapeake Bay Foundation, Inc.* v. *American Recovery Co.*, 769 F.2d 207 (4th Cir. 1985), to support their theory that they should have been permitted to pursue their claims against the City despite the fact that those very claims had been settled in the government's enforcement action. In fact, that court made no such ruling in that case, having found that the appeal was moot due to the negotiation of a consent decree. *Id.* at 209.

In addition, petitioners incorrectly state that "there is no authority under any case that has dealt with this

issue for the holding below." Pet. 17. To the contrary, only one other court of appeals has faced similar circumstances, and that court's decision is fully consistent with the decision of the court of appeals in this case. In *Atlantic States Legal Foundation, Inc.* v. *Eastman Kodak Co.*, 933 F.2d 124 (1991), the Second Circuit upheld the propriety of dismissing a citizen suit based on the entry of a consent decree in a subsequently commenced government enforcement action. In *Atlantic States*, the State of New York commenced an enforcement action under the Clean Water Act after the Atlantic States Legal Foundation had initiated a citizen suit, and the district court dismissed the citizen suit based on entry of a consent decree between the State and the polluter in the State's enforcement action. On appeal, the Second Circuit held that "[i]f the state enforcement proceeding has caused the violations alleged in the citizen suit to cease without any likelihood of recurrence —has eliminated the basis for the citizen suit—we believe that the citizen action must be dismissed." 933 F.2d at 127. The court explained:

> The purpose of the citizen suit is to stop violations of the Clean Water Act that are not challenged by appropriate state and federal authorities. However, we do not believe the Clean Water Act can or should be read to discourage a governmental enforcement action once a citizen suit has been commenced nor to prevent state or local authorities from achieving a settlement as to conduct that is the subject of a citizen complaint. To hold otherwise would likely lead to underenforcement of the Clean Water Act.

Ibid. That same reasoning applies here.

Significantly, this is not a case where claims made by the citizens in their suit have been left unresolved

by the combined entry of a consent decree in the government's enforcement action and the dismissal of their Clean Water Act claims in their citizen suit. The district court determined that the consent decree had "resolved" the "issues raised against the City under the Clean Water Act," Pet. App. 79, and petitioners conceded in the court of appeals that their Clean Water Act claims against the City "were the same as those made by the EPA," *id.* at 17. In those circumstances, the court of appeals correctly affirmed the district court's dismissal of the citizens' Clean Water Act claims against the City. Furthermore, petitioners commented on the proposed decree, and the district court took their comments into account in reaching its decision. Pet. App. 14. Allowing the citizens now to pursue the same claims resolved by the consent decree, where the relief available to the citizens—injunctive relief and penalties—is identical to that available to the government, would undermine the district court's judgment that the consent decree provides an adequate remedy for the violations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

JOHN A. BRYSON
WILLIAM B. LAZARUS
Attorneys

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